

## XVIII

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# The Law of Armed Conflict as Soft Power

## Optimizing Strategic Choice

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**A**MONG THE MAJOR WESTERN MILITARY POWERS, the United States is distinguished by non-participation in various core legal regimes governing armed conflict. Perhaps most significant is its continued refusal to ratify the 1977 Additional Protocol I to the four Geneva Conventions of 1949, an instrument that most States consider the linchpin of this body of law.<sup>1</sup> Today, the United States is one of only three NATO countries which is not Party to the Protocol, and of the remaining two, France and Turkey, the former is expected to ratify the agreement in the near future. The United States also rejected the 1997 Ottawa Treaty, which prohibits the use, stockpiling, production, or transfer of anti-personnel mines.<sup>2</sup> By March 1999, over 135 States had signed or acceded to the treaty, including every NATO ally except Turkey. More recently still, in 1998, the United States refused to sign the Statute of the International Criminal Court (ICC),<sup>3</sup> a constitutive instrument for the first permanent international tribunal to handle genocide, crimes against humanity, war crimes, and crimes of aggression. Of the countries represented at the Rome Conference, where the final drafting of the Statute occurred, only seven voted against the treaty. Joining the United States in opposition were China, Iraq, Israel, Libya, Qatar, and Yemen, hardly an admirable grouping of bedfellows.<sup>4</sup> Such examples are illustrative, not exhaustive. Over the past half decade, the United

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

States has opposed or only incrementally moved towards ratification of any number of additional treaties governing the conduct of warfare.<sup>5</sup>

Despite the oft visceral condemnation of the U.S. position on these and other issues involving the international law of armed conflict—criticism which great powers with great power interests inevitably attract—in the vast majority of cases the United States has articulated sound objections to the legal regime concerned. For instance, it objects, *inter alia*, to provisions in Protocol I that might act to legitimize malevolent national liberation movements<sup>6</sup> and believes that the Ottawa Treaty as drafted would frustrate defense of the Korean Peninsula.<sup>7</sup> As to the ICC Statute, the United States fears an expansive jurisdiction that could theoretically extend to members of the U.S. armed forces over the objections of the United States government.<sup>8</sup> One may question the degree of risk posed by each of these possibilities, or even their relative likelihood, but the fact of risk is difficult to dispute.

The dilemma is that sound objections do not necessarily render rejectionist policy decisions wise. A State choosing not to participate in any partially objectionable treaty regime would quickly find itself isolated in the global community, for few legal instruments are innocuous in their entirety, and those that are tend to lack substance. Instead, a “flaw” in a treaty may or may not merit refusal to opt into a particular regime.

In arriving at sound decisions regarding what course to pursue, the key lies in the *process* of decision making. Of course, in some situations a matter is so clear-cut that process is peripheral. For instance, a treaty proposing to outlaw aerial warfare would hardly merit serious attention; there is little risk that faulty decision making processes would lead to a bad decision on whether to ratify such an instrument. As this extreme example exemplifies, the simpler the issue, the more the decision-maker can rely on “informed intuition,” the art of drawing conclusions in the absence of absolutely dispositive data. Experience and training allow him to intuitively perform those analytical steps necessary to come to the right conclusion. However, as issues become more complex, it is increasingly valuable to consciously and deliberately work through the decision making process, one that may not be intuitively grasped. Lest such process-orientation be deemed form over substance, it is important to grasp that the motivation for such endeavors is substance through form.

In the field of national security there is no shortage of approaches to decision making.<sup>9</sup> This essay proffers one methodology for making national security decisions in the legal arena. It is an approach that is likely pursued, either intuitively or consciously, in many of the world’s capitals. Indeed, it risks restating the obvious. Nevertheless, much as there is value in process itself, there is

corresponding value in regularly contemplating process so as to perfect and internalize it. Hopefully, the approach suggested here will help refocus attention on the art and science of process, thereby allowing decision-makers to exercise choice regarding the law of armed conflict in a way that optimizes congruency with national interests. This will foster enhanced control over, and an ability to shape, the international environment.

Before commencing, one caveat is in order. While discussion will include comment on changes in the international environment that affect the dynamics of the law of armed conflict, this essay is not meant to criticize or support any particular policy decision that has been, or is likely to be, made. Rather, the intent is to explore in a general way the *how*, not the *what*, of decision making in the field. Additionally, although the essay is somewhat U.S.-centric in terms of illustration and analysis, no criticism of specific decision making is intended—the process described should be applicable to normative decision making by any State.

### The Nature of the Law of Armed Conflict

To understand process, it is first necessary to comprehend the medium in which it will operate, in this case, the law of armed conflict. For many, law and war are opposing constructs. War is the breakdown of law. Indeed, Carl von Clausewitz dispenses with international law quickly in the opening paragraphs of his classic, *On War*:

War therefore is . . . an act of violence intended to compel our opponent to fulfill our will. . . . Self imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany it without essentially impairing its power. . . .<sup>10</sup>

Clausewitz's skepticism, writing as he was in the nineteenth century, is perhaps understandable, for, by his time, advances in weaponry and the advent of conflict involving whole societies, which really began with Napoleon's use of citizen soldiers in the French Army of the 1790s, had caused war to become a particularly brutal activity. It remained largely unregulated by any comprehensive or systematic normative framework throughout the century. Only with Henri Dunant's publication of *A Memory of Solferino* in 1862 did the notion of limiting the scale and scope of violence during armed conflict begin to gain momentum.<sup>11</sup>

Today, by contrast, the role of the law of armed conflict clearly controverts Clausewitz's characterization as "imperceptible" and "hardly worth mentioning." Aside from a very extensive collection of treaties, the law has proven quite effective (although not infallible) in a number of twentieth century conflicts.<sup>12</sup> It limits targeting decisions, restricts the use of various weapons, mandates treatment of prisoners of war and other detainees, protects non-combatants, and sets forth the nature of occupation. The law of armed conflict also articulates standards for the resort to force as an instrument of national policy, safeguards the rights of neutrals, and increasingly extends into conflicts that are purely internal. Related bodies of law address such issues as arms and weapons technology transfers, disarmament, emplacement of weapons, and mechanisms for enforcement. The extensive debate over both the NATO decision to bomb Serbia and the legality of striking the targets selected during Operation Allied Force illustrates the degree to which legal issues have come to pervade assessments of war and warfare. By the end of the twentieth century, little doubt remains that law has the ability to shape conflict—that it is a very potent form of soft power available to States and other international actors.

Given its capacity to influence the actions of States, the law of armed conflict is essentially national policy expressed. After all, States are generally bound only by those prescriptive norms to which they consent. Consent can be signaled either by becoming a Party to a treaty or by participating in a practice that eventually matures into customary law. Customary norms, like the prohibition on directly targeting civilians or civilian objects, are those evidenced by both consistent and widespread State practice and *opinio juris*, a conviction that the practice is legally obligatory.<sup>13</sup> Although there is some debate over its effect on either States that do not participate in the practice or newly emergent ones,<sup>14</sup> for all other States the requisite practice represents a form of policy choice.

Characterization of law as policy choice is not meant to deny its moral component; much law is clearly underpinned by rectitude. Yet to the extent a State embraces the law of armed conflict out of adherence to moral principles, it has implicitly made a policy choice based on what it deems to be in its national interests. Many States view a moralistic quality to their national policy as beneficial, either tangibly or intangibly, directly or indirectly. That does not detract from the fact that the exercise of choice as to whether to participate in a legal regime is nothing less than a policy decision driven by a State's desire to shape armed conflict consistent with its particular national interests. Such States

simply define their national interests in a way that incorporates a moral dimension.

The concept of shaping is a seminal one. Warfare and the law of armed conflict enjoy a close symbiotic relationship. Since evolution in the conduct of warfare affects the individuals and objects which law seeks to shelter, it is not surprising that progress in the law of armed conflict has tended to track major conflicts and major technological advances with great regularity.<sup>15</sup> When it does, it shapes future conflict. This dynamic is becoming increasingly consequential. As an example, the direct targeting of civilian population centers, a tragically regular occurrence during the Second World War, was unusual in late twentieth century aerial attacks. When it does occur, as in Iraqi SCUD missile attacks against Israeli cities during the 1990–1991 Gulf War, the global reaction is one of outrage. The outrage is not only the product of moral condemnation, but also results from a sense that the rules of the game—the laws of armed conflict—have been breached.

Law can even shape war for those not party to a particular normative standard. For instance, Additional Protocol I, which the United States has not ratified, prohibits most attacks on dams, dikes, and nuclear electrical generating stations.<sup>16</sup> Despite U.S. opposition to this particular provision, there have been no U.S. attacks on any of these target sets since the Vietnam War; should it conduct such an attack it would be condemned, for many will miss the fine distinction between a customary norm of international law, which binds all States, and a treaty norm, which obligates only parties to comply.<sup>17</sup> Apprehension over condemnation certainly influences the policy choice of whether to engage in such strikes. This *de facto* effect of law on non-Party State actions can only expand as military operations become increasingly multilateral in composition, thereby frequently allying States with disparate legal obligations. In most such cases, the greatest common normative denominator will apply. For instance, it would be hard to imagine, e.g., U.S. forces in a coalition intentionally conducting an operation that would violate Protocol I, but no other legal regime, if any significant coalition partners were parties to the treaty. The realities of coalition-building and maintenance would simply not allow it.

So law and policy are closely related, in many cases overlapping, concepts. Law is a form of soft power that can profoundly shape conflict in ways that may or may not advance a particular State's interests. That being so, it is only logical that States approach policy decisions concerning legal regimes in ways that track processes of strategic choice regarding security affairs, the global economy, the environment, and so forth. Of course, the process of choice must be

customized to the unique nature of law, but normative decisions are nonetheless classic examples of strategic choice.

### **The Process of Strategic Choice**

The term “strategic choice” in the legal context implies decision making at either the highest levels of government (as in the decision of whether to opt into a treaty regime), or at a subordinate level when the decision results in national level fallout (as in determining whether to strike targets that may raise questions of legality during a sensitive, and visible, conflict like Operation Allied Force). Because law shapes, it is a strategic tool of national policy which, as with any other tool, must be vectored. Strategic choice is the process by which that vectoring occurs. It may take the form of opposing, supporting, or suggesting changes to a draft treaty, deciding to employ force or use the military in other coercive ways (or refraining therefrom), or conducting operations in a way that raises law of armed conflict issues. Ultimately, the objective is to determine how best to shape the international environment, including armed conflict, to one’s own advantage.

**Step 1: Identify the Interests.** Determining one’s advantage begins by identifying “national interests,” a term of art used to refer to a State’s highest tier goals and concerns.<sup>18</sup> In the vast majority of cases, they may be grouped into one of three categories—security, well-being or value. Security interests are those involving physical security, territorial integrity, sovereignty, and the maintenance of a society’s core values, such as those expressed in the Constitution. These interests are certainly implicated in the law of armed conflict context, for to the extent law can shape war, it affects a State’s ability to defend itself and its allies. The use of anti-personnel mines on the Korean peninsula serves as apt illustration. North Korean numerical superiority poses a quandary for those planning defense of South Korea. Mines, particularly in light of the Korean geography and topography, can be used to channelize invading forces such that the defenders can concentrate firepower upon them. To agree to remove anti-personnel mines from the U.S.-South Korean inventory altogether, as mandated by the Ottawa Treaty, would be to deny this option to those responsible for the defense of the country.

National interests based in well-being enhance quality of life. They often are economic in nature (jobs, income, availability of goods, and so forth), but may also extend to health care, educational opportunity, environmental quality, leisure activities, convenience, and the like. Again, certain aspects of the law of

armed conflict respond to such interests. For instance, the laws of neutrality balance the “interests” of belligerents in effectively prosecuting a conflict with those that neutrals have in continuing to engage in commerce.

Value interests are much more pervasive in the laws of armed conflict. They comprise those externally focused interests that lie beyond our borders—democracy, justice, human rights, human dignity, and so forth.<sup>19</sup> Obviously, the bulk of the law of armed conflict addressing how armed conflict may be conducted, the *jus in bello*, falls within this category; in fact, increasing use of the term “humanitarian law” in lieu of either the “law of armed conflict” or the “law of war” is indicative of a growing commitment to the value aspects of this *corpus* of law. So too is the recent involvement of U.S. and other forces in humanitarian operations involving the use of force (e.g., Northern Iraq, Somalia, Kosovo), operations which must be justified by that component of international law governing the resort by States to force, the *jus ad bellum*. To the extent international law permits intervention for humanitarian purposes, value interests are at play.

In fact, the two foundational objectives of the *jus in bello*—separating out those who are involved in the fight from those who are not and limiting the scope and nature of the violence that occurs during combat—are both grounded in value interests. They acknowledge armed conflict as a fact of international (and increasingly internal) activity, but seek to limit its impact on the human condition. Thus, for example, civilians may not be directly targeted,<sup>20</sup> medical facilities<sup>21</sup> and cultural objects receive special protection,<sup>22</sup> and weapons that would needlessly exacerbate human suffering are forbidden.<sup>23</sup> Such strictures represent a recognition that the destruction and hardship war creates are, as a general matter, contrary to human values. To the extent States embrace these values, they represent a national interest that may be fostered through strategic policy choices resulting in international law.

**Step 2: Value the Interests.** In assessing whether a particular strategic choice regarding matters of law advances national interests, it is important to understand that all national interests do not enjoy equal valence. Thus, they must be valued. This is so because, as noted earlier, realization of most interests comes at the expense of certain other ones. Avoiding civilian damage or injury (a value interest), as an example, may require a mission to be executed in a less than optimal way (a security interest). Additionally, the process is not a level one, for a very rough hierarchy of interests exists. As a general matter, security, well-being and value interests are ranked from high to low respectively. This *a priori* ordering reflects the fact that a State will ordinarily seek to survive before

it attempts international self-actualization and will usually attribute preeminence to its own interests over those of others. Obviously, in any individual case, the intensity of interests may vary from this scheme, the avoidance of civilian casualties just cited being one illustration. Nevertheless, and regardless of whether one personally agrees with the "ranking," the reality is that States do tend to broadly order interests along these lines.

The U.S. case serves as an example of the process. In *A National Security Strategy for a New Century*, the White House has articulated U.S. national security interests. Three are core: enhancing security (obviously, a security interest), bolstering America's economic prosperity (a well-being interest), and promoting democracy abroad (a value interest).<sup>24</sup> Of course, each is interrelated. Enhancing security safeguards economic wherewithal; economic prosperity makes security expenditures possible; democracy abroad diminishes potential security threats and fosters trade, and so forth. Other States may harbor differing interests, or at least harbor them to a differing degree. For instance, Luxembourg is probably less concerned about security interests than a superpower such as the United States, whereas States such as North Korea, Iraq, or Libya may well see the expansion of the democratic community as a negative trend.

The United States values its interests by grouping them into three categories: "vital," "important," and "humanitarian and other." Vital interests include "physical security of our territory and that of our allies, the safety of our citizens, our economic well-being and the protection of our critical infrastructures."<sup>25</sup> Important national interests do not affect national survival, but do affect U.S. national well-being and the character of the world. An example of efforts to support important interests includes NATO operations in Bosnia-Herzegovina. Finally, humanitarian and other interests are those which the U.S. must safeguard because its "values demand it."<sup>26</sup> Responding to disasters or violations of human rights, supporting democratization and civil control of the military, and fostering sustainable development are all examples. Irrespective of the national interests themselves, the point is that strategic choice, including normative strategic choice, should be exercised so as to advance the overriding national interests, and that cannot be accomplished until the interests have been valued.

**Step 3: Develop Objectives Advancing the Interests.** The process of identifying advantage continues with the development of objectives for the national interests. Conceptually, national interests imbue strategic choice with direction, but they are too broad to be of practical utility themselves.



Objectives, by contrast, are states of being that realize a national interest; they are much narrower than interests. For example, whereas the defense of vital U.S. allies is a U.S. national interest, the defense of South Korea from North Korean attack is an objective. Care must also be taken not to confuse objectives with strategies; an objective is "what" needs to be accomplished, strategy the "how." Strategies are the methods by which objectives that advance national interests are achieved.

Thinking in terms of opportunities and threats facilitates identifying objectives.<sup>27</sup> The process relies on the fact that all States seek both to exploit opportunities that advance national interests and counter threats to them. Thus, objectives are always responsive to threats and opportunities (and aspirations). The U.S. case exemplifies this approach. It has explicitly identified a number of threats to its national interest in security at home and abroad—regional or State centered threats (e.g., Iran, Iraq, North Korea), transnational threats (terrorism, international crime, drug trafficking, illicit arms trafficking, uncontrolled refugee migration, and environmental damage), the spread of dangerous technologies (especially weapons of mass destruction), foreign intelligence collection, and failed States.<sup>28</sup> This being so, its strategic objectives necessarily include countering these threats. Similarly, U.S. superpower status, including financial and military predominance, allows for greater influence (opportunities) in international security matters than any other State. The U.S. has leveraged this power, e.g., to assist in the emergence of democratic institutions throughout Eastern and Central Europe and, albeit somewhat controversially, (and working through NATO) to arrest Serbian suppression of the Kosovars. Other representative opportunities include such varied advantages as technological dependence on the United States by other countries and the excellence of U.S. higher education. It should come as little surprise that U.S. strategic objectives include exploiting these opportunities.

For the law of armed conflict to have any meaning, it must either act to forestall threat-based objectives or exploit opportunity-based ones. Most often, the objective of law is to respond to a threat to a national interest. Examples include ensuring the broad security of the State (the *jus ad bellum*), protecting civilians, maintaining the civilian infrastructure, and continuing civil society during occupation. However, the law of armed conflict also contains elements of opportunity-based objectives. The principle of proportionality, for instance, allows a commander to prosecute an operation despite collateral damage and incidental injury so long as the quantum and quality of military advantage that ensues is sufficient to outweigh the civilian consequences.<sup>29</sup> Similarly, when justified by security concerns, civilians may be interned during an

occupation.<sup>30</sup> In both cases, the law acts to permit military forces to operate without undue constraints.

Thus, strategic choice, even for matters involving the law of armed conflict, requires clarity of goals. It is only after this has been achieved that support for or opposition to a particular normative regime can possibly make sense, for it is insensible to ignore threats to interests or oppose those proposals which advance one's ultimate interests.

*Step 4: Value the Objectives.* Once objectives that support the respective national interests are identified, they must be valued. In most genres of strategic choice, this process takes the form of ordering, that is, developing a hierarchy of need as to a State's various objectives. At the risk of gross oversimplification, such ordering is often mandated because the resources available to pursue objectives are finite; the issue, then, is the allocation of scarce resources.<sup>31</sup> A State may be forced, for instance, to choose between buying fighter (*re* firepower) or transport (*re* mobility) aircraft. Mobility and firepower are not inherently contradictory (arguably they are complementary), but given limited resources, strategic choice must occur to determine which option best effectuates the State's individualized national interests. Ordering facilitates identifying the "best buy."

In the law of armed conflict context, however, ordering is necessitated by the fact that the objectives often operate at cross-purposes. Resource allocation may surface as an issue (if weapon A is illegal, what must the State obtain to compensate for the loss of capability?), but it generally is not heavily implicated in the process of choice. This is because normative regimes do not directly consume resources; their cost is political and human, not fiscal. Instead, objectives relevant to law, as noted earlier, may well clash. For instance, nuclear weapons pose enormous risk to the global community, but their use in certain circumstances might actually deter acts of greater harm by malevolent international actors. Indeed, the principle of reprisal (which is the subject of much controversy) implicitly recognizes this conflict by allowing the resort to proportional illegal acts to convince an opponent to desist from its own illegal course of action. Because the dynamic is one of contradiction vice competition, assessment of objectives is best thought of in terms of net valuation instead of vertical ordering. The process will often compel strategic choice involving balancing designed to identify net gain, rather than simply plotting "value" along a continuum.

In any event, many variables affect the value attributed to an objective. Further, the importance ascribed to each will be determined in part by one's

experience, education, ideological bent, and cognitive approach—in other words by “informed intuition.” Despite the complexity (and imprecision) of valuation, several variables pervade the process.

**Intensity:** Among the most influential is the intensity with which the actor holds the national interest in question. For instance, the United States views the security of U.S. territory and that of its allies as a vital interest, whereas humanitarian concerns such as human rights are tertiary. This is consistent with the general propensity for security to outweigh value interests. Intensity measurements render it theoretically reasonable to reject a proposed legal norm that poses a moderate threat to security interests even though it might greatly advance a value interest such as human rights.

The dispute over the nature of the legal regime that should be applied to information operations during armed conflict exemplifies the phenomenon. Some argue that targeting instruments of communication which spread propaganda should be forbidden, emphasizing the contention that ideas must be defeated by the force of competing ideas, not the force of arms. Others counter that such felicity to the idea of free speech (value interest) is naïve, for propaganda can endanger the security of their forces and hinder mission accomplishment. They would, resultantly, oppose any limits on striking communications targets, even though in the vast majority of scenarios the military benefits (security interest) of doing so are moderate at best.<sup>32</sup> The point is that while the interest being advanced is seldom dispositive, it certainly matters.

**Likelihood:** Objectives should also be valued in terms of likelihood. This variable recognizes that the intensity of an interest must be qualified by the likelihood that the opportunity in question will present itself or the threat will become a reality. The Korean case is an excellent example. It is not enough to say that the intensity of the security interest in defending South Korea outweighs the U.S. value-based interest in alleviating civilian suffering—in this case that caused by anti-personnel mines. Rather, it is necessary to weigh the very certain human suffering that anti-personnel mines will cause against the likelihood of a North Korean invasion. Similarly, consider U.S. concerns over the International Criminal Court Statute. There, the competing interests are human rights and well-being versus security (for U.S. forces). The objective which advances the former is punishment/deterrence of war criminals (in the sense understood by laymen), while that which fosters the latter is avoidance of placing U.S. forces at risk of politicized prosecution. Clearly, the prospect of U.S. personnel facing prosecution by a politicized court merits attribution of significant intensity value. That said, the multiple safeguards built into the ICC

system, in great part in response to U.S. concerns, should serve to render the *likelihood* of such an occurrence very low.<sup>33</sup>

**Immediacy:** A third recurring variable is immediacy, the extent to which opportunity or threat objectives are near or long term.<sup>34</sup> Near-term threat and opportunity objectives should be accorded somewhat greater weight than long-term ones. Of course, it could be argued that an immediacy criterion obfuscates the process by sacrificing long-term objectives for immediate gratification. However, it must be remembered that immediacy is but one of any number of variables used to calculate value. More to the point, immediacy is relevant because the further one projects into the future, the more speculative that projection and the less certain any attempt to fashion the future as one desires. The risk lies in forgoing an immediate opportunity only to find that future opportunity is foreclosed for reasons that could not possibly have been foreseen. Along the same lines, deferring reaction to an immediate threat and thereby suffering the consequences thereof in order to avoid a future threat, may in retrospect prove ill-advised.

Again, consider anti-personnel mines. The U.S. desire to continue using them in South Korea is a sensible military decision. However, this opportunity objective must be viewed in light of the threat objective of precluding their use against U.S. forces. In the last decade, U.S. forces and their allies have increasingly been involved in peace operations, either Chapter VI or Chapter VII in nature,<sup>35</sup> where mines pose a particularly nasty threat. As this essay is being written, they are currently hindering operations in Kosovo and the only casualties KFOR forces have suffered have resulted from mines. Complicating matters is the fact that the likelihood of U.S. forces using mines themselves during a peace operation is *de minimus* because most such operations are combined<sup>36</sup> in nature, and most forces operating with the U.S. will be prohibited from using them. Their use by U.S. forces would create such a row in coalition partner countries that for reasons of political expediency they are generally inutile. The bottom line is that in the types of conflicts the U.S. is currently engaged in (and the type it is likely to be engaged in any time in the near future), anti-personnel mines are causing immediate dreadful civilian suffering and are an immediate threat to U.S. forces. By contrast, their use in conventional large scale conflict, such as that envisaged for the Korean peninsula, is, regardless of likelihood (a different question altogether), temporally more remote.

**Degree of Advancement/Harm:** A fourth variable is the extent to which exploitation of opportunity objectives may advance, or ignoring threat objectives may harm, the interest in question. This differs from intensity, which simply asks how strongly held the interest is; here the query is the extent to which

the objective advances the interest. It also differs from strategy, which is designed to advance *objectives*. Recall that one U.S. national interest is security at home, and that drug trafficking, illicit arms trafficking, environmental damage, certain rogue States, failed States, and so forth are defined as threats thereto. Countering each is a differing objective fostering the same interest. As between these objectives, intensity is a constant. Yet, the degree to which successfully achieving them advances the interest in security varies widely. Winning the war on drugs is a very much different thing in terms of advancing national security than winning the war against environmental degradation.

A similar phenomenon applies in the legal setting. For instance, operations conducted in response to the failure of a State will not have the same valence in terms of advancing national security interests as those executed in a State-on-State context. This bears directly on the normative environment that a State might seek because the shaping effect of law depends on the milieu in which it operates. Resolution of issues such as detention of civilians, combatant status, "occupation" activities, use of force, and neutrality may well depend on whether the operations are conducted as part of an internal disturbance, internal armed conflict, international armed conflict, or some variant of peace operation.

Finally, it must be grasped that valuation is not a mathematical calculation. On the contrary, it is merely a process for helping decision-makers think through what it is they should accomplish.

**Step 5: Choose a Normative Strategy.** To this point, no strategy decision has been made, i.e., no actions have been proposed or refrained from. As noted, strategies are game plans for *how* to accomplish the objective (the *what*) that was identified and evaluated during the previous step. The process of strategic choice writ large now turns to the identification and development of strategies designed to effectuate the objectives just valued. This process, which has been described in greater depth elsewhere,<sup>37</sup> involves determining which of one's objectives are "obligatory" (e.g., nuclear deterrence), and then appraising others to determine how best to fashion an overall strategic plan that maximizes opportunity and minimizes risk given finite resources.

Legal strategies must be assessed somewhat uniquely, if only because they are less directly resource dependent than are most other national security strategies. Of course, all strategic choice poses costs and benefits and requires trade-offs. However, as alluded to earlier, non-legal choice is more often an either-or proposition than is the case with legal choice. Strategies for the former frequently come only at the expense of one another. Law, however, often

imposes a pluralistic predicament—for the proposed regime will often contain *both* positive and negative elements—and does so as to myriad objectives. The question is not so much the cost of the strategy as it is the harm its adoption will generate. This being so, strategic choice may be depicted as follows:

(value of objective advanced) x (degree to which proposed legal strategy advances that objective) minus (value of objective harmed) x (degree to which proposed legal strategy harms that objective).

It must be emphasized that the “formula” is not intended to be objectively quantifiable, but is only a way to order thoughts when making strategic choice.

The Korean scenario and its implications for anti-personnel mines may be used, in a somewhat artificially simplistic and one-dimensional way, to demonstrate the process. A properly sequential decision making calculation would first determine how important the defense of South Korea (and other uses for mines such as perimeter defense) is by considering, *inter alia*, the factors outlined above. It would also consider the degree to which availability of anti-personnel mines contributes to that objective. Next, an assessment of the importance of the objectives anti-personnel mines harm, like the well-being of non-combatants and the safety of one’s own forces from mines, and an estimate of the extent to which the failure to adopt a ban sets them back, would be required. The alternative strategies involved are opposing and supporting a ban respectively. Harm would then be subtracted from the benefit to suggest the desirability of the strategy. Thus, in this process, net value is calculated by considering normative strategy holistically. Of course, the process, albeit easily explained, is extremely complicated. Multiple objectives may be involved, intangible factors must be identified and valued, and dissimilar phenomenon must be balanced against each other. Nevertheless, the process does help order analysis.

The last step, then, is to evaluate strategies. As with each of the steps, a measure of “informed intuition” is necessary; ultimately, the determination is subjective. That said, it should be cognitively robust. Robustness demands, at a minimum, considering four variables—opportunity costs, reverberating effects, strategic multipliers/constraints, and hierarchical consequentiality.

**Opportunity Costs:** An opportunity cost is a measurement of those options which are foreclosed should a particular strategy be chosen. For instance, in an effort to scale down the nature and scope of violence on the battlefield (an objective), a protocol to the Conventional Weapons Convention (a normative strategy) prohibits use of air-delivered incendiaries against valid military

objectives within concentrations of civilians.<sup>38</sup> Such a strategy comes at significant cost, for incendiaries are particularly useful against certain targets, such as bunkered, biological, or chemical facilities.<sup>39</sup> Thus, adoption of the prohibition costs the military commander a useful tool to achieve other valid objectives in pursuit of national interests. Or consider nuclear weapons. There is little question but that such weapons are extraordinarily destructive, so much so that the International Court of Justice has opined that their use in situations other than self-defense where the survival of the State is at stake (and perhaps even then) violates the law of armed conflict.<sup>40</sup> Yet, as illustrated during the Gulf War, nuclear weapons may well be valuable in deterring the use of other weapons of mass destruction, particularly those unavailable to the nuclear power as a result of other normative strictures, such as the prohibitions on chemical and biological weapons.<sup>41</sup> Their unavailability to deter (or respond and compel an opponent to desist from further use) is an opportunity cost that must be considered in appraising whether the State in question should support a normative strategy opposing their possession or use.

**Reverberating Effects:** Related to opportunity costs is the reverberating effects variable. Whereas opportunity cost calculations are characterized by direct tradeoffs among the objectives pursued, reverberating effect is the indirect fallout from a particular strategy choice. Opportunity costs deny a warfighter the opportunity to pursue a course of action that would advance an objective; reverberating effects are the incidental costs associated with a particular strategy choice.

Return to the incendiary example. A reverberating effect of the prohibition thereon would be that warfighters might have to resort to weapons that would actually cause greater collateral damage or incidental injury than would be the case with incendiaries. Thus, while the opportunity cost is an inability or diminished capability to attack a target, the reverberating effect is unintended harm to civilians and civilian property. As this case illustrates, a reverberating effect may paradoxically bear on the very objective (protection of civilians and civilian objects) that the prescriptive norm seeks to advance in the first place. The prohibition on permanently blinding lasers found in the Conventional Weapons Convention presents a similar example.<sup>42</sup> As a result of the prohibition, commanders who would have otherwise employed blinding lasers to foil an attack on their perimeter will be forced to resort to traditional weapons such as mortars, mines (barring an Ottawa Treaty prohibition), and machine guns. This is an opportunity cost. The reverberating cost is the increased collateral damage and incidental injury that might result in certain circumstances from the use of kinetic means of defense.

**Multipliers and Constraints:** A third variable against which to measure proposed normative strategies is the effect of multipliers and constraints. Strategic multipliers are factors, often contextual in nature, that further a strategy's advancement of an objective. Conversely, strategic constraints limit fulfillment. To illustrate, multipliers in a security strategy context might include burden sharing, alliance operations, or even economic interdependency. The key is to ask what conditions in the existing or future environment might render success or failure of the strategy (whether it be supporting/opposing a proposed legal regime or implementing one) likelier. With regard to normative strategies, relevant multipliers or constraints could include such factors as public support or opposition; intragovernmental dynamics; the attitude of intergovernmental or nongovernmental organizations towards the strategy; the scope, degree and sources of support it receives from other governments; recent experiences that might auger for acceptance of the strategy; media attention; the relative success of analogous legal regimes; and so forth.

Take several recent opportunities for normative strategic choice. As an example, some have asserted that the tragic death of the late Princess Diana, a strident supporter of a ban on anti-personnel land mines, added much needed impetus to the campaign to outlaw them, and contributed significantly to adoption of the Ottawa Treaty. Thus, by this line of reasoning, her untimely death represented a multiplier for mine opponents. Similarly, it should not be surprising that the ICC Statute was adopted within a decade of the establishment of the Hague and Arusha Tribunals, the first such international bodies since the Nuremburg and Tokyo trials.<sup>43</sup> By the same token, and perhaps somewhat cynically, one may argue that the Hague Tribunal is the partial result of warfare (and the ensuing war crimes and crimes against humanity) touching the face of Europe for the first time since 1945.

The point is not to provide a catalogue of potential multipliers and constraints. Rather, it is simply to demonstrate that the strategic environment matters, and that, therefore, strategic choice is inevitably situational. For example, imagine the difficulty of executing U.S. strategy vis-à-vis the Kosovo crisis had NATO support not been secured. In light of strategic choice's situationality, what is a constraint today may be a multiplier tomorrow and vice versa; some may be neither except in certain circumstances. Despite the uncertainty, the net result of a multiplier/constraint analysis should be a better understanding of the proposed strategy's viability and the suggestion or exclusion of alternatives.

**Hierarchical Consequentiality and its Subtlety:** Finally, what is often missed in assessing strategies is an appreciation of their hierarchical nature and



the oft subtle nature of their consequences. The consequences of normative strategic choice lie at multiple levels of analysis. Such choices clearly affect the tactical (battle) and operational (theatre) levels, for it is there that the armed conflict is actually conducted. To the extent the overall course of the conflict shifts, an impact is also felt at the strategic (national) level. What is perhaps counterintuitive, however, is that strategies may not operate in parallel at the various levels of analysis; strategies may have disparate hierarchical impact, that is, they may generate benefits at one level and harm at another.

Usually, States are fairly adept at identifying immediate tactical and operational level consequences of normative proposals, for warfighters who would be deprived of weapons, targets, or tactics by the laws of armed conflict can rather reliably estimate how a particular stricture will affect them. States are also skilled at identifying strategic level impact on the war effort. After all, legal prescriptions allow or disallow a course of action that one wishes to take or that another is threatening. The very fact of the desire to act or apprehension of an opponent's action suggests that some rational calculation of advantage or harm has occurred.

Not surprisingly, the subtler consequences of normative strategy are often overlooked. Several examples may help illustrate. During the Falklands/Malvinas conflict, both the United Kingdom and Argentina made a strategic decision to carefully comply with the law of armed conflict. As a result, both war termination and the return to normalcy of relations between the two States were facilitated, thereby advancing national interests other than those directly implicated in the decision to employ force to settle their differences. A sense that Coalition forces would abide by the laws of armed conflict regarding the treatment of prisoners likewise contributed in no small measure to the unprecedented willingness of many thousands of Iraqi soldiers to surrender as early as possible during the Gulf War. Contrast those experiences with the Iraqi decision to generally disregard the law of armed conflict during the war and in the months immediately following the cease-fire. Repeated violations led to near universal distrust of the Iraqi regime, which in turn contributed to the longevity of the post-conflict monitoring, sanctions, and enforcement regimes. Regardless of any tactical or operational objectives Saddam Hussein may have hoped to advance by violating the law of armed conflict,<sup>44</sup> he badly miscalculated the strategic consequences of his malfeasance. Similar disregard for the laws of armed conflict (as well as human rights law) has severely complicated efforts to return the Balkans to stability.

In each of these cases, decisions as to whether or not to comply with the laws of armed conflict had implications beyond what might have been immediately

apparent. Analogous subtlety exists when considering prospective normative regimes. The ICC Statute brouhaha offers multiple examples. Unconsented to jurisdiction over U.S. personnel, an obvious consequence, is central to U.S. hostility. But there are other somewhat more abstruse consequences. For instance, by refusing to participate in the regime (as it now exists), and by aligning itself, however intentionally, with the global miscreants that populate the opposition camp, the United States sets itself apart from virtually all of its key partners. In doing so, it risks forfeiting some degree of normative stewardship that it would otherwise exercise as the sole superpower. Indeed, opting out of a regime as normatively axial as the Court could potentially tarnish the general perception of the United States as committed to the rule of law (might criticism of NATO—aka U.S.—bombing during Operation Allied Force portend future skepticism towards U.S. compliance with the law of armed conflict?). Opting out also forgoes an opportunity to aggressively lead the Court in directions that advance U.S. interests.

On the other hand, by the terms of the Statute the Court is empowered to exercise jurisdiction even over nationals of States that are not Party to it.<sup>45</sup> Of course, many of the crimes enumerated admit of universal jurisdiction, but arguably the Statute goes beyond the present scope of such jurisdiction. That being so, it bears on the nature of the international law-making process, particularly its consent-based predilection, and on the normative valence of widely ascribed-to agreements. Thus, opposition to the jurisdictional provisions may be justified by far broader concerns than the unlikely prospect that a U.S. soldier may one day be unjustly hauled before the Court; the subtler consequences are perhaps the more insidious.

As should be apparent, it is absolutely essential that decision-makers appraise strategies at every level of contact. What may seem appealing at one level might prove disastrous at another. Further, the subtlety of consequentiality is profound in the legal arena. Any urge to focus on the immediately apparent consequences must be resisted lest a far more determinative one be missed. The goal is not simply a strategy that fosters objectives (and thereby interests) or deters threats thereto, but rather one that represents a net advance of interests. To accurately calculate such advances requires robust analysis.

### **The U.S. Environment**

Although this essay is about the process of choice, not any particular U.S. policy decision regarding the law of armed conflict, it may be useful to

comment briefly on the strategic environment in which the U.S. will practice normative choice, and to offer several thoughts on its ramifications. After all, context is key, as has been repeatedly asserted.<sup>46</sup>

The pivotal event influencing the exercise of normative strategic choice is the demise of Cold War bipolarity and the emergence of the United States as the sole economic and military superpower. During the Cold War, the normative context was characterized by competition between two peer competitors. Significantly, the competition was generally viewed as zero-sum. Both States were powerful militarily and boasted a stable of client States with which they maintained mutual defense pacts and which comprised a distinct economic bloc. Although the United States would become involved in a number of "lesser" conflicts, Vietnam being the most noteworthy, most were seen in terms of their relationship to superpower rivalry. Moreover, in the national security context, the conflict that mattered most was the one that never occurred, the cold war turned hot. Reduced to basics, and somewhat oversimplified, issues and events were viewed through the prism of U.S.-USSR competition. Since the Soviets, particularly its military, were "equals," great vigilance was necessary to ensure they did not slip ahead. For example, recall the anxiety that was generated when Sputnik was launched in October 1957 (particularly over its implications for the delivery of nuclear weapons against the U.S. homeland) and the intense U.S. effort to "catch back up."

By the 1960s, a relative strategic stalemate had emerged, thereby exacerbating fear of any Soviet advantage. Because neither side dared let the other achieve an edge, even small advances by an opponent loomed large. This attitude, justified or not, inevitably led to difficulties in fashioning improvements to the law of armed conflict and caused those that were proffered to be evaluated microscopically. Given the strategic stalemate, minor issues took on great significance.

In fact, the Cold War produced very little in the way of laws of armed conflict. In 1954, the Cultural Property Convention was completed under the auspices of the United Nations Educational, Scientific and Cultural Organization, but it is only very recently that the prospect of U.S. ratification appears likely.<sup>47</sup> The two Additional Protocols to the Geneva Conventions were adopted in 1977, but the U.S. opposes the most significant of them, that governing international armed conflict, and has not yet ratified the other. Although the United States objected strongly to certain of the Protocol's provisions at the time, in retrospect one might query whether two decades of opposition to Additional Protocol I have safeguarded U.S. interests in any discernable way. After all, when have U.S. forces engaged in activities since 1977 that they would

not otherwise have been allowed to had the U.S. been party to the instrument? Nevertheless, in the context of the Cold War, concerns about both political issues (e.g., implied recognition of national liberation movements) and warfighting limits (e.g., certain restrictions on striking dams, dikes, and nuclear electrical generating stations) took on added importance. Other examples include U.S. hostility to Protocol III of the Conventional Weapons Convention (incendiaries) and the U.S. refusal to ratify the 1925 Gas Protocol until 1975 out of fear that the agreement might reach the use of riot control agents and herbicides or limit the response to a chemical attack to non-chemical means.<sup>48</sup>

What the United States understood very clearly was that law does have a shaping effect on the conduct of hostilities; it is an element of strategic control. With a hostile, heavily armed peer competitor at hand, the U.S. sought to avoid having law shape the battlefield in any way disadvantageous to it or advantageous to its adversary.

However, the strategic paradigm has changed.<sup>49</sup> Law still shapes, and clearly can be used to the U.S. disadvantage, but the dynamic involved is very different. With no peer competitor on the immediate horizon, particularly in the military realm, the calculations of strategic choice shift. For instance, the wide U.S. technological advantage over potential adversaries, and the far greater redundancy of U.S. weapon systems, means that an inability to employ a single type of weapon will often be less consequential to the U.S. than other States, which may have neither alternatives available nor the technological wherewithal to timely develop one. Similarly, assume a proposed international agreement heightens the requirement for discrimination. The new "brilliant" weapons being fielded by U.S. forces would allow it to comply more easily with heightened standards than any other military. Even if the U.S. were to be precluded from striking a particular target that it would previously have been permitted to attack, its advantage in information systems will enable its forces to find and destroy alternative targets capable of yielding analogous benefits far more easily than its opponents.

Most importantly, the issue is no longer whether the unavailability of particular weapons or tactics will hurt the U.S. *sans plus*. Instead, the overwhelming military superiority of its forces gives the U.S. the luxury of risking potential "negative" security consequences in order to pursue alternative objectives and interests. With an antagonistic peer competitor just over the horizon, security loomed so large as an interest that it dwarfed all others. That is no longer the case. On the contrary, U.S. dominance logically bestows on the United States greater capacity to shape the international legal environment than it has ever enjoyed. If the United States is to take advantage of this unique period, it must

remember that objectives are both threat and opportunity-based. The balance between the two has arguably shifted for the United States. While threat-based objectives remain critical, they no longer need be all encompassing; it would only seem logical that the United States should aggressively exploit the occasion to “shape” the prescriptive landscape to its advantage.<sup>50</sup>

Doing so requires a migration in strategic perspective not dissimilar from that which has taken place in other arenas of national security strategy. During the Cold War, Containment served U.S. national security interests well; some maintain that it won the Cold War. However, Containment was ill-suited to the strategic post-Cold War environment. The new context required a strategy that exploited U.S. dominance, one that recognized the opportunities it presented—hence, the new U.S. national security strategy of “Engagement.”<sup>51</sup>

A strategy of normative engagement could serve to leverage U.S. power in much the same way. Such an approach would require the U.S. to proactively lead the international community. A failure to exercise leadership allows potential opponents, who well recognize the shaping import of law, to use it to compensate for their own weaknesses. Indeed, from their perspective law can be viewed as an instrument of asymmetrical warfare, for it is equally accessible to everyone and, therefore, unlike technology (for instance) more widely exploitable. As an example, and regardless of how one views the substantive merits of the case, there is little question but that the United States would have suffered a serious strategic blow had the International Court of Justice declared the use of nuclear weapons contrary to international law in all circumstances. Of course, the opinion was only advisory, but the persuasive import of such a holding would have been measurable nevertheless and certainly a factor to be considered in any strategic calculations. It would seem apparent, then, that involvement in the process is the key, for international law is, by definition, a multilateral process. The decision, for example, of the United States to participate in the post-Conference Preparatory Committee charged with drafting rules of procedure, rules of evidence, and elements of the offenses for the ICC, despite the U.S. vote against the Statute, is an extraordinarily sage one. The alternative is to sit idly by while the rest of the global community crafts a legal regime that will unquestionably affect U.S. military operations and personnel. Given that there are more U.S. personnel deployed outside its borders than any other State, to have refused to participate would approach irresponsibility.

Of course, in light of its sole superpower status, it would be tempting for the United States to simply opt out of those proposed legal regimes that did not completely meet U.S. desires. Any such approach would be shortsighted, particularly in ignoring the intangible, but very real, benefits that come with global

participation and leadership. Anecdotal evidence suggests that the U.S. is increasingly viewed as the boy who took his marbles and went home in the game of international law. It does what it wants because it can, fashioning *ex post facto* legal justifications therefore. Regardless of the accuracy of any such criticism, the mere perception does violence to an overarching national security strategy based on engagement.

Thus, the current international context offers the United States unprecedented, and very welcome, opportunities for normative engagement. In great part, this is because the end of the Cold War moderated the normative threat environment. Of course, to properly exploit this opportunity requires the exercise of sagacious strategic choice. Unfortunately, although the new strategic paradigm expands the scope of choice for the United States, choice has become far more enigmatic. While the two-dimensionalism of the Cold War tempered law's pluralistic character, the current global environment complicates it.

### Final Thoughts

This essay has suggested that the law of armed conflict is a powerful form of soft power capable of shaping the battlefield in consequential ways. As such, decisions regarding proposed legal regimes or activities with normative import are in fact serious strategic policy decisions. Unfortunately, informed intuition is all too often relied upon to make the complex decisions necessary for optimizing normative strategic choice. In response to this reality, the essay proffers a skeletal decision process to facilitate choice, one designed to identify and assess possible strategies in the context of the various objectives they advance or harm. Since objectives, and the national interests they foster, do not equally advance the welfare of a State (or may even operate at cross purposes), they must be valued before strategic choice is possible. This allows for informed choice regarding normative schemes that may advance or harm any number of objectives and interests simultaneously in ways that are dependent on the context in which they operate.

Lest this process be misinterpreted, it is perhaps best to conclude by reemphasizing what has not been asserted. First, the process suggested is neither all-encompassing nor mathematical in nature. It simply represents a way to think about normative regimes and activities with normative elements. The goal is orderly thought processes as an alternative to resorting to informed intuition alone in complex situations. There are certainly variables not mentioned that might affect the process, and it is a subjective process that in the end relies on the quality of human cognition.

Second, it deserves mention that normative decisional processes do not operate in strategic vacuums. Nor is international law a strategic panacea. A State has multiple tools at its disposal to achieve objectives and foster its interests; law is but one. Therefore, even if law is an appropriate and sensible way to advance an objective, it may not be the best one. The classic debate regarding how best to effect human rights is illustrative. How should States respond to abuses thereto? Normatively? Militarily? Economically? Through engagement or isolation? A combination thereof? This essay only addressed normative analysis; further examination, particularly of alternatives to normative strategies, remains to be accomplished before wise strategic choices can be made.

Third, the essay recommends no policy choices. While it does advocate normative engagement, engagement alone is a void which is meaningless without substantive goals.

Fourth, there has been no argument for decision making based only on a State's individual selfish interests. Instead, the process suggested merely recognizes that the reality of State-centrism dictates, at least for the foreseeable future, how States make strategic choices. Ultimately, it is their auto-interpretation of national interests that matters when they decide how the global normative architecture should best be constructed. Some States will end up making moral choices, others immoral ones. Hopefully, most will conclude that the former comports most closely with their national interests.

Finally, and most important, the essay begs the question of the precise normative strategies the United States should pursue to advance its national interests. Whatever the right answer may be, U.S. strategy must be infused with a recognition that U.S. national interests have always been, and must remain, heavily value laden. Indeed, superpower status involves both rights *and* duties. As the next millennium approaches, those duties clearly include benevolent custodianship of global human dignity and well-being.

#### Notes

1. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391 (hereinafter Additional Protocol I). Although Additional Protocol I was not ratified by certain States, many of its provisions (but not the environmental provisions) are considered declaratory of customary international law. For a non-official, but generally considered authoritative, delineation of those considered declaratory, see Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987). See also INTERNATIONAL & OPERATIONAL LAW DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPT OF THE AIR FORCE, OPERATIONS LAW DEPLOYMENT

DESKBOOK, tab 12, and comments by the then State Department Legal Advisor Abraham D. Sofaer in *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 784 (1988).

2. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 INTERNATIONAL LEGAL MATERIALS 1507, reprinted in INTERNATIONAL REVIEW OF THE RED CROSS, Sept.-Oct. 1997, at 563. On the convention generally, see Stuart Maslen and Peter Herby, *An International Ban on Anti-Personnel Mines: History and Negotiation of the "Ottawa Treaty,"* INTERNATIONAL REVIEW OF THE RED CROSS, Dec. 1998, at 693. A survey of the land-mine issue, with emphasis on operational concerns, is contained in Andrew C.S. Efav, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MILITARY LAW REVIEW 87 (1999).

3. Rome Statute for the International Criminal Court, U.N. Doc. A/Conf. 183/9, July 17, 1998, at Annex II, reprinted in 37 INTERNATIONAL LEGAL MATERIALS 999 (1998) and M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL COURT: A DOCUMENTARY HISTORY* 39 (1999), and available on-line at <http://www.un.org/law/icc/texts/romefta.htm>. For a discussion of the Statute, see Michael N. Schmitt and Peter J. Richards, *Into Uncharted Waters: The International Criminal Court*, NAVAL WAR COLLEGE REVIEW (Winter 2000), at 93 and the series of articles collected in Volume 93:1 of the AMERICAN JOURNAL OF INTERNATIONAL LAW (1999).

4. Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHT, Aug. 1999, available on-line at <http://www.asil.org/insight23.htm>. Note that there are differing lists as to which countries voted against the Statute, since the vote was taken without polling. This article adopts that list published by the American Society of International Law. Other countries mentioned as possible no-votes (which would replace one of those above) include Algeria, India, and Sri Lanka.

5. E.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 14 INTERNATIONAL LEGAL MATERIALS 49 (1975); Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216, reprinted in THE LAWS OF ARMED CONFLICTS (Dietrich Schindler & Jiri Toman eds., 1988), at 745; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex II (1977), 16 INTERNATIONAL LEGAL MATERIALS 1442 (1977); Additional Protocol [to the Conventional Weapons Convention] on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, reprinted in THE LAWS OF ARMED CONFLICTS, *supra*, at 190.

6. Broad U.S. objections are outlined in Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess. III (1987), reprinted in *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 910 (1987).

7. For the U.S. perspective, see The White House, Office of the Press Secretary, Fact Sheet: U.S. Efforts to Address the Problem of Anti-Personnel Landmines, <http://www.pub.whitehouse.gov/white-house-publications/1997/09/1997-09-17-landmine-fact-sheets.text>.

8. For a description of the U.S. position by the Ambassador that represented the United States at Rome, see David J. Scheffer, *The United States and the International Criminal Court*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 12 (1999).



9. For a description of several, see Michael N. Schmitt, *Identifying National Objectives and Developing Strategy: A Process Oriented Approach*, STRATEGIC REVIEW, Winter 1997, at 24, 24–26.

10. CARL VON CLAUSEWITZ, ON WAR, ch. I, para. 2 (1832) (Anatol Rapoport ed., 1968). Or consider the view of General von Molke, the Prussian Chief of Staff, in an 1880 letter protesting the Declaration of St. Petersburg (one of the earliest formal law of war efforts): “The greatest kindness in war is to bring it to a speedy conclusion. It should be allowable, with that view, to employ all means save those that are absolutely objectionable.” The letter was to J.C. Bluntschli, an international legal scholar. MOLKE IN SEINEN BRIEFEN (Berlin, 1902), at 253, cited in MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (2d ed., 1992), at 47.

11. HENRI DUNANT, SOUVENIR DE SOLFERINO (1862). The International Committee of the Red Cross was established not long after Dunant’s account of the bloody Battle of Solferino during the Italian War of Unification was published in the book.

12. For instance, the 1990–1991 Gulf War. The legal aspects of the war are described in DEPARTMENT OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (1992), at appendix O.

13. The Statute of the International Court of Justice defines custom as “a general practice accepted by law.” Statute of the International Court of Justice, June 26, 1977, art. 38(1)(b), 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153, 1976 YEARBOOK OF THE UNITED NATIONS 1052. The Restatement notes that custom “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987). See also North Sea Continental Shelf Cases, 1969 ICJ 3, 44 (“Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it.”); The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed 320 (1900); The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10(1927); Asylum Case (Col. v. Peru), 1950 I.C.J. 266; Case Concerning Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6.

14. The view that customary law applies only to States that have participated in the custom is illustrated in the classic case of S.S. Lotus (Fr. V. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 21. For a contrary view, see the RESTATEMENT, *supra* note 13, at § 201.

15. Therefore, progress may be either reactive or proactive. The Geneva Convention of 1906 and the Hague Conventions of 1907 followed closely on the heels of the 1905 Russo-Japanese War. World War I, in great part, served as the impetus for the 1925 Gas Protocol and the 1929 Geneva Convention. The enormous devastation of the Second World War led to the 1949 Geneva Conventions and 1954 Cultural Property Convention. In the aftermath of World War II, bipolarity and wars of national liberation dominated inter-State conflict, while new technologies and sensibilities led to heightened concerns over the methods and means of warfare. The Additional Protocols to the Geneva Conventions, Environmental Modification Convention, Biological Weapons Convention, Conventional Weapons Convention, and Landmines Convention resulted. So too did numerous arms control treaties designed to limit the testing, possession, and spread of nuclear weapons, the unprecedented power of which had been so dramatically illustrated at Nagasaki and Hiroshima. Proactive efforts seek to head off negative consequences before they occur. For instance, Protocol IV of the Conventional Weapons Convention prohibited the use of permanently blinding lasers before they were fielded by any armed force.

16. Additional Protocol I, *supra* note 1, art. 56.

17. It *might* also be asserted that the Protocol I prohibition has by now matured into customary international law, thereby binding the United States regardless of its non-Party status vis-à-vis the Protocol.

18. For discussions on the process of defining national interests, see Carrol J. Doherty, *Defining the National Interest: A Process of Trial and Error*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, March 26, 1994, at 750; Kim R. Holmes, *Defining National Security and American Interests*, in *A SAFE AND PROSPEROUS AMERICA* (2d ed., 1994), at 5; DONALD E. NUCHESTERLEIN, *AMERICA RECOMMITTED: UNITED STATES NATIONAL INTERESTS IN A RESTRUCTURED WORLD* (1991).

19. Some have argued against any substantive force for value interests. For example, Hans Morgenthau has noted that "The invocation of abstract moral principles was in part hardly more than an innocuous pastime; embracing everything, it came to grips with nothing. . . . The intoxication with moral abstractions . . . is indeed one of the great sources of weakness and failure in American foreign policy." HANS MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* (1952), at 4.

20. E.g., Additional Protocol I, *supra* note 1, art. 51.

21. E.g., *id.*, art. 12.

22. E.g., *id.*, art. 53.

23. E.g., *id.*, art. 35.2.

24. THE WHITE HOUSE, *A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY* (Oct. 1998), at iii, available on-line at <http://www.whitehouse.gov/WH/EOP/NSC/html/documents/nssrpref.html> [hereinafter NSS]. The NSS is complemented by the National Military Strategy. JOINT CHIEFS OF STAFF, *NATIONAL MILITARY STRATEGY OF THE UNITED STATES* (1997), available on-line at <http://www.dtic.mil/jcs/core/nms.html>. An additional key document in identifying U.S. national interests and the objectives/strategies that may foster them is the QDR Report. SECRETARY OF DEFENSE, *REPORT OF THE QUADRENNIAL DEFENSE REVIEW* (May 1997), especially Sections II–IV, available on-line at <http://www.defenselink.mil/pubs/qdr/>.

25. NSS, *supra* note 24, at 5.

26. *Id.*

27. A RAND study has also identified the importance of threat and opportunity, though it employs the concepts primarily as descriptors in discussing four alternative "strategies"—realism, multilateral security, democratic internationalism, and independence. See generally Norman D. Levin, ed., *PRISMS AND POLICY: U.S. SECURITY AFTER THE COLD WAR* (RAND, 1994).

28. NSS, *supra* note 24, at 7.

29. The principle is reflective of both conventional and customary international law. It forbids, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Additional Protocol I, *supra* note 1, art. 51.5(a). See also art. 57.2(a) (iii).

30. E.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 78, 6 UST 3516, 75 U.N.T.S. 287 (Internment that is "necessary, for imperative reasons of security.")

31. But certainly not always. For example, consider President Nixon's "playing of the China card" or the expansion of NATO.

32. See, e.g., William M. Arkin, *Changing the Channel in Belgrade*, Special to [washingtonpost.com](http://www.washingtonpost.com), May 24, 1999, available on-line at <http://www.washingtonpost.com/wp-srv/national/dotmil/arkin052499.htm>.

33. In particular, a potent Pre-trial Chamber has significant power to preclude the possibility of politically motivated prosecutions.

34. An interesting approach is a multi-dimensional hierarchy of foreign policy objectives in which time (immediacy) and priority are related. The resultant scheme is a division into core objectives (middle and high priority), middle-range goals and long-range goals (distant and low-priority). Objectives in each of the categories are placed along a continuum ranging from concrete to abstract values. T.J. HOLSTI, *INTERNATIONAL POLITICS: A FRAMEWORK FOR ANALYSIS* (1988), at 118–130.

35. The terms “Chapter VI” and “Chapter VII” refer to chapters of the UN Charter. The former, often known as peacekeeping operations, is a response to any dispute which is “likely to endanger the maintenance of international peace and security.” It generally does not involve the use of force except in self-defense and occurs with the consent of the States in which the peacekeepers are stationed. Chapter VII operations, also known as peace enforcement, may be non-consensual. They are responses by the UN Security Council, including the use of force (e.g., Desert Storm), that respond to “threats to the peace, breaches of the peace, and acts of aggression.”

36. “Joint” operations include forces of more than one service. “Combined” operations include forces of more than one State.

37. See Schmitt, *Identifying National Objectives*, *supra* note 9, at 29–31.

38. Conventional Weapons Convention, Protocol III, *supra* note 5.

39. The United States has not ratified Protocol III, although it is considering doing so with a reservation that incendiaries can be used in areas with concentrations of civilians when doing so will result in fewer incidental injuries than would be the case with other types of weapons. The Army's Operational Law Handbook cites the example of a chemical munitions factory in a city. The use of conventional weapons might well disperse the chemical, whereas an incendiary weapon would destroy them through burning. THE JUDGE ADVOCATE GENERAL'S SCHOOL, *OPERATIONAL LAW HANDBOOK* (2000), at 5–13.

40. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. (Advisory Opinion), (General List 95), *dispositif*, 35 *INTERNATIONAL LEGAL MATERIALS* 809 & 1343. On the case, see VED P. NANDA & DAVID KRIEGER, *NUCLEAR WEAPONS AND THE WORLD COURT* (1998); Peter H.F. Bekker, *Legality of the Threat or Use of Nuclear Weapons*, 91 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 126 (1997); Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 64 (1997); John H. McNeill and Ronald D. Neubauer, *The International Court of Justice Advisory Opinion in the Nuclear Weapons Cases* (8 July 1996): *A First Appraisal*, *INTERNATIONAL REVIEW OF THE RED CROSS*, No. 316, Jan.–Feb. 1997, at 103; Michael N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, *NAVAL WAR COLLEGE REVIEW*, Spring 1998, at 91.

41. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583, 11 *INTERNATIONAL LEGAL MATERIALS* 310; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 *INTERNATIONAL LEGAL MATERIALS* 800.

42. Additional Protocol on Blinding Laser Weapons (Protocol IV) to the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 12, 1995, U.N. Doc. CCW/CONF.I/7 (1995), 35 *INTERNATIONAL LEGAL MATERIALS* 1218.

43. The Hague Tribunal is handling violations of the law of armed conflict and other offenses occurring in the former Yugoslavia, whereas the Arusha Tribunal is doing the same for events in Rwanda. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704, annex (1993), reprinted in 32 INTERNATIONAL LEGAL MATERIALS 1192 (1993); International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens, S.C. Res 955, annex, reprinted in 33 INTERNATIONAL LEGAL MATERIALS 1602 (1994).

44. For example, by releasing oil into the Persian Gulf and setting over 500 oil wells ablaze. While the actual motivation remains a mystery, it is theoretically possible that he took the former action to foil any amphibious landing and the latter to complicate Coalition aerial operations.

45. This is because, by Article 12, jurisdiction extends to nationals of States that are Party to the Statute or to crimes committed on the territory of a Party. Interestingly, in certain circumstances jurisdiction does not extend to nationals of States which are Party to the Statute. For instance, Article 11 provides that it does not have jurisdiction over offenses committed by nationals of a Party State when the offenses were committed before ratification, and jurisdiction is based on Party status.

46. For speculation on how warfare in the future might affect the normative (and moral) architecture intended to govern it, see Charles J. Dunlap, Jr., *Technology and the 21st Century Battlefield: Recomplicating Moral Life for the Statesman and Soldier* (Strategic Studies Institute Monograph, Army War College, Jan. 15, 1999); Michael Schmitt, *Bellum Americanum: The U.S. View of Twenty-first Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1051 (1998); Michael N. Schmitt, *Future War and the Principle of Discrimination*, 28 ISRAEL YEARBOOK ON HUMAN RIGHTS 51 (1999).

47. Cultural Property Convention, *supra* note 5.

48. When it ratified the Protocol in 1975, the U.S. reserved the right to use chemical weapons if the other side did so first. The U.S. also maintained the position that the agreement did not extend to riot control agents or herbicides, but by an executive order established a policy requiring Presidential approval in most cases of first use. Executive Order 11850, 40 Fed. Reg. 16187 (1975). To a more limited extent, this has remained an issue with the 1993 Chemical Weapons Convention, which was ratified by the United States and came into force in April 1997. For a discussion of the topic, see OPERATIONAL LAW HANDBOOK, *supra* note 39, at 5-13 - 5-14.

49. Advantage was taken of the change as early as the Gulf War. Recall the President's decision on November 8, 1990, to reinforce deployed Desert Shield forces by approximately 200,000 personnel. To fulfill this requirement, the Army turned to VII Corps, based in Europe. Among the reasons cited for selection of VII Corps was the fact that "the military threat was significantly lower in Europe and would safely permit removal of one Corps." CONDUCT OF THE PERSIAN GULF WAR, *supra* note 12, at E-27.

50. The United States was an early supporter of the International Criminal Court, and, thus, was arguably doing so.

51. On Engagement, see NSS, *supra* note 24, at 1-3.